COMMONWEALTH OF VIRGINIA, *ex rel*.

STATE CORPORATION COMMISSION

v. **CASE NO. PUE000388**

COLUMBIA GAS OF VIRGINIA, INC.

REPORT OF ALEXANDER F. SKIRPAN, JR., HEARING EXAMINER

March 23, 2001

In this Rule to Show Cause, Staff and Old Virginia Brick allege that Columbia Gas is failing to comply with its filed transportation tariff. Specifically, Staff and Old Virginia Brick maintain that the Company overcharges customers when they purchase gas directly from Columbia Gas in connection with banking and balancing services provided by Columbia Gas.

HISTORY OF THE CASE

On August 3, 2000, Staff filed a Motion Requesting Issuance of a Rule to Show Cause ("Motion") requiring Columbia Gas of Virginia, Inc. ("Columbia Gas" or "Company") to show cause why it should not be found in violation of Virginia Code §§ 56-234, 56-236, and 56-237, for failure to comply with its filed tariffs. In its Motion, Staff sought to enjoin Columbia Gas from continuing to disregard its filed tariffs and sought the imposition of fines and penalties as may be appropriate.

On August 10, 2000, the Commission issued its Rule to Show Cause why Columbia Gas should not be found in violation of Virginia Code §§ 56-234, 56-236, and 56-237 for failing to comply with its filed tariffs and why, because of the Company's failure to cease such violations, the Commission should not impose fines and penalties and enjoin Columbia Gas from further violations. In its order, the Commission directed Columbia Gas to file a responsive pleading on or before August 29, 2000. Further, the Commission directed Columbia Gas and Staff to file on or before August 29, 2000, a joint stipulation of material facts relating to this matter. Finally, the Commission directed Columbia Gas to furnish notice of this proceeding; set September 15, 2000, as the deadline for Staff and Columbia Gas to submit legal briefs; and assigned this matter to a Hearing Examiner.

On August 29, 2000, Columbia Gas filed a Response to Rule to Show Cause and Motion to Dismiss ("Response and Motion"). Columbia Gas contended that it has not overcharged transportation customers and that it billed such customers according to the terms, conditions, and intent of its tariff. Therefore, Columbia Gas argued that the Rule to Show Cause should be dismissed.

Also, on August 29, 2000, Staff and Columbia Gas filed a joint stipulation of facts ("Joint Stipulation"). This document lists ten undisputed material facts and three disputed issues of fact.

On September 22, 2000, Staff and Columbia Gas filed briefs supporting their positions.[1] On November 9, 2000, a Hearing Examiner's Ruling scheduled a public hearing and established a procedural schedule for the filing of testimony and exhibits.

On January 19, 2001, a public hearing was convened. Representing Columbia Gas were Kodwo Ghartey-Tagoe, Esquire, and James Copenhaver, Esquire. Arlen Bolstad, Esquire, and William Chambliss, Esquire, represented the Staff. Filed with this Report are transcripts from the hearing.

SUMMARY OF THE RECORD

This case revolves around a disagreement regarding the application of the banking and balancing provisions of the Company's tariff. There appears to be little, if any, disagreement as to the relevant underlying facts.

This case began with Staff's investigation of a complaint filed by Old Virginia Brick Company, Inc. ("Old Virginia Brick") against Columbia Gas. Old Virginia Brick purchases gas transportation service from Columbia Gas under Rate Schedule TS-1.[2] As shown below, Rate Schedule TS-1 is made up of four declining rate bocks:

First 1,000 MCF	$0.8866 per MCF
Next 4,000 MCF	$0.5082 per MCF
Next 15,000 MCF	$0.2511 per MCF
Over 20,000 MCF	$0.1741 per MCF[3]

The structure and rates of Rate Schedule TS-1 are identical to the base, non-gas volumetric charges of the Large General Service ("LGS") rate schedules for firm, standby, interruptible, and curtailable options.[4]

Old Virginia Brick also subscribes to the banking and balancing service offered by Columbia Gas.[5] Among other things, this service permits a customer to purchase gas from Columbia Gas when the customer uses more gas than it has delivered to the Company's system and the customer's bank

[1] On September 15, 2000, the Commission issued an Order Extending Time for Filing Legal Briefs or Memoranda, which extended the filing date for briefs from September 15, 2000, to September 22, 2000.
[2] Joint Stipulation at ¶ A. 2.
[3] Exhibit REH-5, at Appendix B.
[4] *Id.*
[5] Joint Stipulation at ¶ A. 3.

volumes either are not available or equal zero.[6] At the center of this dispute is how Columbia Gas bills a customer, such as Old Virginia Brick, when the customer uses more gas than it has delivered to the Company's system. Columbia Gas bills such customers for excess volumes of gas purchased at the average daily city gate price for the month published in *Gas Daily*.[7] In addition, Columbia Gas applies the interruptible non-gas components (*i.e.*, base non-gas, administrative costs, and gross receipts tax) of Rate Schedule LGS to such purchases, including each of the applicable declining rate blocks. The dispute between Staff, Old Virginia Brick, and Columbia Gas relates to which rate blocks are used for the gas purchased from Columbia Gas. Basically, Staff and Old Virginia assert that all gas delivered, including excess gas purchased from Columbia Gas, should be billed under the declining blocks of the transportation rate schedules. By contrast, Columbia Gas treats the excess gas purchased from Columbia Gas separately, subjecting additional gas volumes to the higher cost first blocks of its rate schedules.

For example, in February 2000, the total of both transportation volumes and excess volumes of gas delivered to Old Virginia Brick would have placed excess volumes purchased from Columbia Gas into the third rate block of Rate Schedule TS-1.[8] However, Columbia Gas separated the two volumes when it calculated its bill to Old Virginia Brick. Thus, Columbia Gas utilized the first rate block of Rate Schedule LGS for excess volumes purchased from Columbia.[9] This difference in methodology increased the bill for Old Virginia Brick for February 2000, by $874.35.[10] Furthermore, based on its LGS Sales Tariff, Columbia Gas included an additional administrative charge of $121.72.

In its investigation of the complaint filed by Old Virginia Brick, Staff determined that Columbia Gas followed its standard billing practice concerning the purchase of excess volumes.[11] Staff believes that the Company's standard billing practice violates its tariff and that Columbia Gas should refund excess amounts billed to customers.[12] Columbia Gas continues to follow its standard billing practice and has not agreed to make any refunds.[13]

Moreover, Columbia Gas and Staff stipulated that the Company's standard billing practice concerning the purchase of excess volumes was reflected in the billing determinants, rate design, and revenue requirements in Case Nos. PUE970455 and PUE980287 ("1997 and 1998 Rate Cases")[14] The parties also agreed that if the billing determinants utilized in the 1997 and 1998 Rate Cases had been consistent with Staff's tariff interpretation in this case, then the actual rates would have been higher

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[6] *Id.*
[7] *Id.* at ¶ A. 4.
[8] *Id.* at ¶ A. 5.
[9] *Id.*
[10] *Id.*
[11] *Id.* at ¶ A. 6.
[12] *Id.* at ¶ A. 7.
[13] *Id.*
[14] *Id.* at ¶ A. 8.

than those approved by the Commission.[15] Consequently, Staff's tariff interpretation would result in lower revenues for Columbia Gas.[16]

Staff and Columbia Gas listed three disputed issues of fact. They are as follows:

1. Whether Company's method of billing TS-1/TS-2 customers for purchases of excess volumes of gas is consistent with the way costs associated with such service are incurred.[17]

2. Whether Company's current application of the tariff to purchases of excess volumes is consistent with the manner in which it has billed such purchases over the last approximately ten years.[18]

3. Whether Staff's proposed application of Company's tariff would result in a below cost rate for the purchase of excess volumes.[19]

On November 27, 2000, Staff filed the testimony of John A. Stevens, utilities engineer with the Commission's Division of Energy Regulation. In his testimony, Mr. Stevens adopted the affidavit filed with Staff's Motion Requesting Issuance of a Rule to Show Cause, provided a brief history of the case, and addressed several arguments made in the initial round of briefs.[20] Specifically, Mr. Stevens contended that Columbia Gas failed to adjust its billing determinants in the 1997 and 1998 Rate Cases to reflect its change in tariff language.[21] Thus, instead of correcting the mistake in billing determinants, the Company has chosen to reapply its old billing methodology.[22] Moreover, Mr. Stevens pointed out that Staff's application of the Company's tariff is consistent with the Company's explanation of its tariff change in the 1997 Rate Case which stated that banking and balancing customers taking excess volumes would be charged the "*normally applicable TS-1 or TS-2 rate*.[23] Finally, Mr. Stevens maintained that Staff's application of the Company's tariff permitted Columbia Gas the opportunity to recover its costs and did not interfere with the appropriate price signals of the cost of gas.[24]

On December 11, 2000, Columbia Gas filed the testimony of two witnesses. Mark P. Balmert, business services manager of regulatory compliance for Columbia Gas and Columbia Gas of Ohio, Inc., explained the workpapers supporting the billing determinants supplied to Staff by the Company in the

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[15] *Id.* at ¶ A. 10.
[16] *Id.*
[17] *Id.* at ¶ B. 1.
[18] *Id.* at ¶ B. 2.
[19] *Id.* at ¶ B. 3.
[20] Exhibit JAS-1.
[21] *Id.* at 5-7.
[22] *Id.* at 6-7.
[23] *Id.* at 10.
[24] *Id.* at 11.

1997 and 1998 Rate Cases.[25] Also, Mr. Balmert asserted that the tariff change adopted in the 1997 Rate Case was not intended to change its rate design.[26] Robert E. Horner, manager of regulatory policy for Columbia Gas, claimed that the Company has not violated the terms and conditions of its tariff.[27] In this regard, Mr. Horner stated that because the excess volumes provision is a "sales" service, the Company is correct to apply the terms and conditions of Schedule LGS.[28] Furthermore, Mr. Horner affirmed that the Company's billing methodology avoids discrimination against interruptible and standby service customers and is consistent with the rationale underlying the tariff change approved in the 1997 Rate Case.[29]

On December 19, 2000, Staff filed the rebuttal testimony of John A. Stevens.[30] In his rebuttal testimony, Mr. Stevens reiterated that it was the Company's responsibility to ensure that its billing determinants reflected the tariff change in the 1997 Rate Case.[31] Failure to do so should not be an excuse for failing to follow its tariff.[32] Mr. Stevens further objected to references made by Columbia Gas to "excess volumes service" or "excess volumes provisions."[33] Mr. Stevens declared that such terms are not used in the Company's tariff and that use of such terms by Columbia Gas creates confusion.[34]

DISCUSSION

Staff alleges that Columbia Gas has failed to comply with its tariff, thereby violating Virginia Code §§ 56-234, 56-236, and 56-237.[35] Specifically, Staff contends that Columbia Gas has failed to comply with the following provision of its banking and balancing tariff for Rate Schedule TS-1/TS-2:

> On days when Company's deliveries to Customer at its facilities exceed Customer's deliveries to Company and Customer's bank volumes are not available, or the Customer's bank volume equals zero, the Customer may purchase excess volumes, if available, from the Company at the average city gate price for deliveries to mid-Atlantic city gates via Columbia Gas Transmission Corporation as published in *Gas Daily* for the month.[36]

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[25] Exhibit MPB-4, at 2-7.
[26] *Id.* at 7-8.
[27] Exhibit REH-5.
[28] *Id.* at 6-7.
[29] *Id.* at 8-15.
[30] Exhibit JAS-6.
[31] *Id.* at 2.
[32] *Id.* at 2-3.
[33] *Id.* at 3
[34] *Id.*
[35] Staff's Pre-Hearing Memorandum of Law at 2-3.
[36] Company's Pre-Hearing Brief at Appendix A, Original Sheet No. 162.

Staff argues that Company's tariff is unambiguous and does not permit Columbia Gas to add additional administrative costs or treat such deliveries as sales subject to Rate Schedule LGS.[37] Moreover, Staff maintains that if the Commission finds the tariff ambiguous, then the ambiguity must be resolved against Columbia Gas.[38] In support of this contention, Staff offers *Smokeless Fuel Company v. The Chesapeake and Ohio Railway Company*[39] in which the Virginia Supreme Court held:

> [I]t is well settled and may be freely conceded that tariffs are to be construed according to their language, and that the intention of the framers is entitled to little, if any, consideration. Furthermore, in cases of doubt, the language of the tariff is to be construed most strongly against those who frame it.[40]

Columbia Gas, on the other hand, maintains that its billing methodology for purchases of excess volumes by TS-1/TS-2 customers complies with its filed tariffs and therefore does not violate §§ 56-234, 56-236, and 56-237.[41] Columbia Gas states that all parties agree that the excess volumes provision of its tariff is "somewhat ambiguous."[42] Thus, Columbia Gas urges the Commission to apply the rule of reason in its interpretation.[43] In support, the Company argues that because the banking and balancing provision permits the "purchase of excess volumes" and Rate Schedule TS-1/TS-2 applies only to transportation and delivery services, "the tariff . . . implies that customers must look to one of the Company's sales tariffs for the pricing of [such] purchases."[44] Further, Columbia Gas asks the Commission to apply the rule of reason in its interpretation because "a literal reading of the tariff would permit customers purchasing excess volumes from the Company under that provision to pay a below cost rate for their gas . . . ."[45] Finally, Columbia Gas submits that the excess volumes provision is "ambiguous because the evidence in this case shows that at the time the tariff was filed in 1997, neither the Commission nor [the Company] intended that the language would absolve Banking and Balancing Service customers purchasing Excess Volumes from paying the non-gas components of [the Company's] interruptible sales service."[46]

Columbia Gas cites *Commonwealth of Virginia, ex rel Harvey v. Mecklenburg Electric Cooperative*[47] where the Commission applied the rule of reason to interpret ambiguous tariff language.

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[37] Staff's Post-Hearing Brief at 3-4.
[38] *Id.* at 5-7.
[39] 142 Va. 355 (1925).
[40] *Id.* at 371.
[41] Company's Post-Hearing Brief at 4-6.
[42] *Id.* at 6.
[43] *Id.* at 6-10.
[44] *Id.* at 7.
[45] *Id.*
[46] *Id.* at 8.
[47] Case No. PUE820078, 1984 S. C. C. Ann. Rep. 380 ("*Harvey*").

> After review of the record in this proceeding, as well as the language of tariff Section 402-I, we find that the tariff language . . . is ambiguous. On the face of the tariff, it is unclear what constitutes a "collection". Hence we must apply the rule of reason in interpreting this tariff to embrace attempts to collect as well as collection visits where money is actually recovered. To interpret this tariff provision otherwise would mean that a customer refusing payment after the Cooperative has incurred the cost of a collection visit could deprive the Cooperative of its collection fee. Collection fees are charged to cover the cost of making collections.
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> However, the tariff does give a customer 10 days after the date of the delinquent notice in which to pay his bill. As we interpret this language, 10 days means the full ten days until the close of business on the tenth day after the date of a notice . . . .[48]

Based on its interpretation of the Cooperative's tariff, the Commission in *Harvey* ultimately held that a collection visit by the Cooperative on the tenth day after the date of a notice to be premature.[49]

In addition, Columbia Gas argues that Staff's interpretation of the Company's tariff is unreasonable.[50] According to Columbia Gas, Staff's interpretation of the Company's tariff is inconsistent with the rate design and revenue requirements upon which current rates are based.[51] Staff's interpretation of the Company's tariff fails to distinguish that the excess volumes provision relates to the sale of gas, which is the domain of Rate Schedule LGS, and not the transportation of gas, which is the exclusive subject of Rate Schedule TS-1/TS-2.[52] Further, Staff's interpretation of the Company's tariff would discriminate against interruptible sales and standby customers.[53] Finally, Columbia Gas insists that Staff's interpretation of the Company's tariff conflicts with both the underlying rationale of the tariff and the Company's past practices.[54]

The focus of the analysis in this case must be to ascertain the meaning of the banking and balancing provision of Company's tariff related to the purchase of excess volumes. This analysis must begin with the language of the tariff to determine whether its meaning is plain. That is, as set forth by the Virginia Supreme Court in *Appalachian Power Co. v. Greater Lynchburg Transit Co.*:

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[48] *Id.* at 381.
[49] *Id.*
[50] Company's Post-Hearing Brief at 11-19.
[51] *Id.* at 11-13.
[52] *Id.* at 13-15.
[53] *Id.* at 15-18.
[54] *Id.* at 18-19.

> A written instrument is not ambiguous "merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement." *Wilson v. Holyfield*, 227 Va. 184, 187 (1984). "We adhere to the 'plain meaning' rule in Virginia." *Berry v. Klinger*, 225 Va. 201, 208 (1983). "[T]he language used is to be taken in its ordinary signification . . . . If, when so read, the meaning is plain, the instrument must be given effect accordingly." *Virginian Ry. Co. v. Avis*, 124 Va. 711, 716 (1919).[55]

The Virginia Supreme Court has defined "ambiguity" as "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time. . . . Doubtfulness; doubleness of meaning . . . of an expression used in a written instrument."[56]

Further, in construing the meaning of the language of the tariff, the initial analysis must focus solely on the words of the tariff. The Virginia Supreme Court has held:

> Where a contract is clear and unambiguous on its face, it is the court's duty to construe it. If the contract is not clear and unambiguous on its face but extraneous evidence makes it so, the court also has the duty to construe it. In the present case, extraneous testimony was presented before the trial court ruled. We are of opinion, however, and so hold that the contract is clear and unambiguous on its face and that no extraneous evidence was needed to construe it to mean precisely what the trial court ruled it meant.[57]

If after examining the language of the tariff, it is found to be ambiguous, then the analysis will shift to other methods of interpretation.

Under the Company's billing method, purchases of excess volumes are billed separately from gas transportation services.[58] For purchases of excess volumes, Columbia Gas applies the average monthly city gate price of gas, which specifically is provided for by its tariff. In addition, for purchases of excess volumes, the Company applies the interruptible non-gas components set forth in Rate Schedule LGS.[59] Columbia Gas claims that it must look to Rate Schedule LGS for the sale of excess volumes because Rate Schedule TS-1/TS-2 covers only the transportation and delivery of gas and does not establish terms and conditions for the sale of gas.[60]

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[55] 236 Va. 292, 295 (1988).
[56] *Fried v. Smith*, 244 Va. 355, 357 (1992) (citations omitted).
[57] *Burns v. Eby & Walker, Inc.*, 226 Va. 218 (1983) (citations omitted).
[58] Exhibit REH-5, at 3, Appendix D.
[59] *Id.*
[60] *Id.* at 6.

Nonetheless, Columbia Gas cannot claim that Rate Schedule TS-1/TS-2 is void of any terms and conditions for the sale of gas. At a minimum, the banking and balancing provisions of this rate schedule set the commodity price of gas. That is, Rate Schedule TS-1/TS-2 explicitly sets the price of excess volumes sold to transportation customers at "the average city gate price for deliveries to mid-Atlantic city gates via Columbia Gas Transmission Corporation as published in *Gas Daily* for the month."[61] Moreover, as highlighted by Columbia Gas during the hearing, Rate Schedule TS-1/TS-2 also includes a "catch-all" provision that permits the Company to bill customers for gross receipts taxes.[62] However, the issue remains, does the Company's tariff indicate whether or not Rate Schedule LGS is applicable to the sale of excess volumes made pursuant to the banking and balancing provision of Rate Schedule TS-1/TS-2? To resolve this issue, let us first examine any references to Rate Schedule LGS found in Rate Schedule TS-1/TS-2, and then evaluate the language defining the application of both rate schedules.

Specific References

Rate Schedule TS-1/TS-2 makes three references to Rate Schedule LGS. The first reference is contained in the banking and balancing section of Rate Schedule TS-1/TS-2 and directly follows the banking and balancing provision at the heart of this case:

> Customers who choose not to subscribe to the Banking and Balancing Service will be cashed-out on a daily basis as follows: On days when Company's deliveries to Customer at its facilities exceed Customer's deliveries to Company, Customer will purchase such excess volumes from Company, if available, at the Company's LGS interruptible sales rate unadjusted for the ACA. . . .[63]

Under the banking and balancing provision at the heart of this case customers "may purchase excess volumes, if available, from the Company at the average city gate price for deliveries to mid-Atlantic city gates via Columbia Gas Transmission Corporation as published in *Gas Daily* for the month."[64] It is significant that the provision for customers not subscribing to the banking and balancing service, explicitly refers to Rate Schedule LGS, while the provision we are concerned with in this case does not. During the hearing, Company witness Horner testified that the reference to Rate Schedule LGS for non-banking and balancing customers was a reference encompassing the total charge to be applied.[65] In other words, this reference includes both the commodity price of gas and the non-gas components set forth in Rate Schedule LGS.[66] Because of the parallel construction of the tariff

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[61] *Id.* at Appendix A, Original Sheet No. 162.
[62] *Id.* at Appendix A, Original Sheet No. 165; Stevens, Tr. at 44; Company's Post-Hearing Brief at 12.
[63] *Id.* at Appendix A, Original Sheet No. 162.
[64] *Id.*
[65] Horner, Tr. at 103.
[66] *Id.*

language, Mr. Horner's testimony suggests the total charge to be applied to purchases of excess volumes by banking and balancing customers, therefore, should be "the average city gate price for deliveries to mid-Atlantic city gates via Columbia Gas Transmission Corporation as published in *Gas Daily* for the month." When given an opportunity to explain this or to point to any language that implicates the non-gas components of Rate Schedule LGS for these sales, Mr. Horner responded:

> I mean that's the ambiguity, in that it's not specified in the language. But the way I get there is the "may purchase excess volumes", and the lack of the TS-1/TS-2 rate schedule being available for sales service, it's unavailable for transportation service.
>
> And I suppose one could go as far as saying then you could even pick the SGS rate schedule. But I think in keeping in line with what historically had been done and what our intent was with this change in language, LGS is the appropriate sales rate schedule to apply.[67]

In summary, based on Mr. Horner's testimony I find that a literal reading of the banking and balancing provision at issue in this case fails to reference Rate Schedule LGS. Incorporation of the non-gas components of Rate Schedule LGS into the terms and conditions of such sales is unlikely given the tariff's specific reference to Rate Schedule LGS in the immediately following provision. Rather than confronting the actual words of its tariff, Columbia Gas attempts to make the case that its tariff is ambiguous. In this regard, Mr. Horner offers two possibilities that may introduce ambiguity. The first is that Rate Schedule TS-1/TS-2 is unavailable for sales service. This issue will be discussed in detail when the general tariff provisions are examined below.

The second possibility for ambiguity involves the Company's past practices. Prior to the tariff change in the 1997 Rate Case, the provision for the purchase of excess volumes by banking and balancing customers also contained a direct reference to Rate Schedule LGS. That is, prior to the change in language, the banking and balancing provision at issue in this case also permitted customers to "purchase excess volumes, if available, from the Company at the Company's LGS Interruptible sales rate, unadjusted for the ACA."[68] Therefore, all that can be said on this topic is that the Company's past practices appear to comply with its prior tariff. But, such past practices do not create or prove "ambiguity" of the current tariff. Put simply, past practices and other extrinsic evidence should be used to resolve, and not create, "ambiguity."[69]

The second specific reference to Rate Schedule LGS contained in Rate Schedule TS-1/TS-2 is in the tariff's rate section. This provision states:

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[67] *Id.* at 104-05.
[68] Exhibit JAS-3.
[69] *See, e.g., Burns v. Eby & Walker, Inc.*, 226 Va. 218 (1983).

> Rate TS1 and Rate TS2 are also used to deliver Company owned gas to Rate LGS Customers.[70]

The provision fails to provide guidance on whether the sale of excess gas to banking and balancing customers under Rate Schedule TS-1/TS-2 incorporates Rate Schedule LGS. It only establishes the corollary, that Rate Schedules TS-1/TS-2 are used in conjunction with service provided under Schedule LGS.

The third specific reference to Rate Schedule LGS within the TS-1/TS-2 Rate Schedules concerns back-up service and provides:

> Unless a Customer has contracted with the Company for LGS Firm/Standby sales service, the Company is under no obligation to deliver gas on any day in excess of the Customer-owned volumes physically delivered into the Company's distribution facilities.[71]

This provision indicates that Columbia Gas has no obligation to provide excess gas. It does not address how such sales are billed.

General Tariff Provisions

Both Rate Schedule TS-1/TS-2 and Rate Schedule LGS contain sections devoted to the availability and character of service. As stated above, these provisions will be examined to determine if they indicate whether or not Rate Schedule LGS is applicable to the sale of excess volumes made pursuant to the banking and balancing provision of Rate Schedule TS-1/TS-2.

Rate Schedule TS-1/TS-2 contains the following provision regarding the availability and character of service:

> a. Gas service under this Rate Schedule is available to any nonresidential Customer located on the Company's distribution system for the transportation and delivery of gas through the Company's distribution facilities; . . . .[72]

Columbia Gas argues that "for the transportation and delivery of gas through the Company's distribution facilities" limits the applicability of Rate Schedule TS-1/TS-2 to exclude terms and conditions for the sale of gas.[73] Consequently, Company witness Horner testified that the banking and balancing provision

[70] Exhibit REH-5, at Appendix A, Original Sheet No. 163.
[71] *Id.* at Appendix A, Original Sheet No. 164.
[72] *Id.* at Appendix A, Original Sheet No. 160.
[73] Company's Post-Hearing Brief at 13.

of Rate Schedule TS-1/TS-2 at the heart of this case was ambiguous because it referred to the "purchase [of] excess volumes" without referring to a specific sales rate schedule.[74]

Based on the record, I find the language stating that Rate Schedule TS-1/TS-2 "is available . . . for the transportation and delivery of gas" does not exclude terms and conditions related to the sale of gas, especially for sales made as a by-product of transportation service. Transportation services permit customers to purchase gas from someone other than the distribution company, have the gas delivered to the distribution company, and then have the distribution company deliver the gas to the customer's facilities. Distribution companies offering transportation service must plan for the likelihood that the volumes of gas they receive from customers will vary from the volumes of gas utilized or delivered to the customer's facilities. As described in the Company's tariff, banking and balancing services are designed to account for such differences in volumes.[75] Consequently, the banking and balancing section of the Company's tariff contains two provisions concerning the sales of gas to transportation customers. The first provision pertains to transportation customers purchasing banking and balancing services, and is the provision at the heart of this case. [76] The second provision is for transportation customers not subscribing to banking and balancing services.[77] As discussed above, this provision directs that such customers "will purchase such excess volumes from the Company, if available, at the Company's LGS interruptible sales rate unadjusted for the ACA."[78] Company witness Horner testified that this sales provision within Rate Schedule TS-1/TS-2 is "directing you at the total charge that would be applied."[79] Thus, a sales provision within Rate Schedule TS-1/TS-2 does not automatically create an ambiguity. Therefore, the provision at the heart of this case, which states that transportation customers may purchase excess volumes from the Company at "the average city gate price for deliveries to mid-Atlantic city gates via Columbia Gas Transmission Corporation as published in *Gas Daily* for the month,"[80] must also be directing us at the total charge to be applied.

Rate Schedule LGS contains the following availability provision:

> a. This Rate Schedule is available to any nonresidential Customer, except as otherwise stated herein. In addition to firm sales service, optional curtailable and interruptible sales service will also be available. The Customer will be required to sign a service agreement setting forth all terms and conditions of service. Service under this rate schedule is available if the

[74] Horner, Tr. at 103-05.
[75] Exhibit REH-5, at Appendix A, Original Sheet No. 161.
[76] *Id.* at Appendix A, Original Sheet No. 162.
[77] *Id.*
[78] *Id.*
[79] Horner, Tr. at 103.
[80] Exhibit REH-5, at Appendix A, Original Sheet No. 162.

> Company has sufficient gas supply and system capacity to serve the load requested by the Customer.[81]

During the hearing, counsel for Columbia Gas represented that Old Virginia Brick was served under a service agreement signed before the tariff change, and that the service agreement did not specify application of Rate Schedule LGS.[82]

Further, the service terms and conditions of Rate Schedule LGS state:

> d. Interruptible and Curtailable Service under this Rate Schedule shall not be available as a standby or back up gas supply for service under any other Rate Schedule of this Tariff;[83]

During the hearing, Mr. Horner was asked if this provision prohibited banking and balancing customers from utilizing Rate Schedule LGS. Mr. Horner's response was as follows:

> Well, I would interpret it to not - - in the case of a balancing service prohibit you from going back to this rate schedule for the rates themselves. I think what it's intended to do is to have a customer that didn't subscribe to banking and balancing . . . from utilizing LGS interruptible service, inclusive of ACAs and refunds, *et cetera*, as their means to supply their facilities when they couldn't get gas or otherwise.[84]

Accordingly, Mr. Horner recognizes that this provision applies to transportation customers served under Rate Schedule TS-1/TS-2. He specifically focuses on transportation customers that do not subscribe to banking and balancing services. As discussed above, Rate Schedule TS-1/TS-2 explicitly states that these customers will be charged "the Company's LGS interruptible sales rate unadjusted for the ACA" for purchases of excess volumes. Thus, the more specific provision in Rate Schedule TS-1/TS-2 avoids the general prohibition of this provision within Rate Schedule LGS. However, transportation customers subscribing to banking and balancing services, such as Old Virginia Brick, do not have specific tariff language pointing to Rate Schedule LGS. Therefore, for such customers, I find that Rate Schedule LGS is unavailable.

In summary, I find that the language of the tariff is unambiguous and does not permit two or multiple meanings. The banking and balancing provision at the heart of this case sets the price for the sale of the gas sold and fails to invoke the rates, terms, or conditions of Rate Schedule LGS. In contrast, the invocation of the terms and conditions of Rate Schedule LGS is made in the immediately

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[81] *Id.* at Appendix B, Original Sheet No. 150.
[82] Ghartey-Tagoe, Tr. at 106-08.
[83] *Id.* at Appendix B, Original Sheet No. 151.
[84] Horner, Tr. at 110-11.

following banking and balancing provision. Moreover, Rate Schedule LGS contains language that prohibits its use as a default interruptible backup service, which is precisely what Columbia Gas attempts to do. I therefore find that Columbia Gas has failed to follow its tariff. Moreover, with the exception of Staff's failure to include gross receipts tax, I agree with Staff's interpretation of the Company's tariff.

In its Post-Hearing Brief, Columbia Gas argues against a literal reading of its tariff.[85] Instead, the Company offers, among other things, evidence that it intended to continue to apply the non-gas charges of Rate Schedule LGS when it changed its tariff in the 1997 Rate Case, that Staff's interpretation is inconsistent with the determinations of revenue requirements and rate design in the 1997 and 1998 Rate Cases, and that Staff's interpretation treats similarly situated customers differently. Because I find that the extrinsic evidence offered tends to support these claims by the Company, I recommend that Columbia Gas not be subject to any fines or penalties. Nonetheless, because the tariff is unambiguous and therefore must be read literally, I agree with Staff that refunds are appropriate in this case.

Accordingly, **I RECOMMEND** that the Commission enter an order that:

(1) **ADOPTS** the findings in this Report;

(2) **DIRECTS** the Company to conform its billing practices to its authorized tariff and refund any amounts collected in error; and

(3) **DISMISSES** this case from the Commission's docket of active cases and passes the papers herein to the file for ended causes.

COMMENTS

The parties are advised that pursuant to Rule 5:16(e) of the Commission's Rules of Practice and Procedure,[86] any comments to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen copies, within fifteen days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a
certificate to the foot of such document that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

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Alexander F. Skirpan, Jr.
Hearing Examiner

[85] Company's Post-Hearing Brief at 7.
[86] 5 VAC 5-10-420 F.